

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KAREN J. DUFFY,

06-CR-1579-BR

Plaintiff,

OPINION AND ORDER

v.

OREGON GLASS COMPANY,

Defendant.

CARLA A. ANDERSON

FRANK S. WESSON

Wesson & Anderson

9115 S.W. Oleson Road, Suite 201

Portland, OR 97223

(503) 292-5122

Attorneys for Plaintiff

WAYNE D. LANDSVERK

Newcomb, Sabin, Schwartz & Landsverk, LLP
111 S.W. Fifth Avenue, Suite 4040
Portland, OR 97204
(503) 228-8446

Attorneys for Defendant

BROWN, Judge.

This matter comes before the Court on Defendant's Motion for Summary Judgment (#21). For the reasons that follow, the Court **DENIES** Defendant's Motion as to Plaintiff's Sixth Claim for breach of contract and **GRANTS** Defendant's Motion as to each of Plaintiff's remaining claims.

BACKGROUND

On September 23, 2005, Plaintiff was fired from her position as Human Resources Director by her supervisor Leon Anderson, General Manager of Defendant Oregon Glass at its Wilsonville, Oregon, location. That day Plaintiff signed a letter that is, in effect, a general "Separation Agreement" with Defendant in exchange for \$2,000 severance pay, a five-week extension of her medical insurance coverage, and Anderson's promise to write a letter of reference for Plaintiff within two weeks of her termination. The Agreement reads in part:

By my signature below and in consideration of the offer presented to me by Oregon Glass Company, I accept this separation agreement. I hereby release and discharge Oregon Glass and its officers, directors, employees and

agents, from any and all claims I may have against any of them, whether known or unknown, relating to my employment by Oregon Glass or the termination thereof.

Pursuant to the Agreement, Anderson provided Plaintiff with a reference letter on October 18, 2005. At Plaintiff's request, Anderson provided another reference letter on April 20, 2006.

On February 24, 2006, Plaintiff filed a claim against Defendant with the Oregon Bureau of Labor and Industries (BOLI) alleging unlawful sex discrimination, age discrimination, hostile work environment, and wrongful discharge in violation of state and federal law. On March 14, 2006, the Equal Employment Opportunity Commission (EEOC) notified Defendant that Plaintiff's BOLI complaint had been filed concurrently with the EEOC.

On April 3, 2006, BOLI issued a memorandum dismissing Plaintiff's complaint for lack of jurisdiction on the ground that the Agreement between Plaintiff and Defendant barred BOLI's investigation of each of Plaintiff's allegations with the exception of her ADEA complaint. In consultation with the EEOC, BOLI transferred Plaintiff's ADEA complaint to the EEOC for further investigation. On April 20, 2006, BOLI issued Plaintiff a notice of right to file a civil lawsuit in state circuit court within ninety days of that date pursuant to Oregon Revised Statute § 659A.880.

On August 4, 2006, EEOC also dismissed Plaintiff's claims on the ground that the EEOC could not conclude "the information

obtained establishes violations of the statutes." EEOC gave Plaintiff notice of her right to file a civil suit in federal or state court within ninety days of Plaintiff's receipt of the notice. In her Complaint filed in this Court, Plaintiff does not indicate when she received the EEOC notice.

On November 7, 2006, Plaintiff filed a Complaint in this Court in which she brought eight claims: (1) Claim One - sex discrimination in violation of Title VII of the Civil Rights Act of 1964, (2) Claim Two - age discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), (3) Claim Three - hostile work environment in violation of Title VII, (4) Claim Four-unlawful retaliation in violation of Oregon Revised Statute § 659A.030(f), (5) Claim Five - wrongful discharge under Oregon common law, (6) Claim Six - breach of contract under Oregon common law, (7) Claim Seven - fraud in the inducement of the contract under Oregon common law,¹ and (8) Claim Eight - intentional infliction of emotional distress under Oregon common law.

On December 14, 2007, Defendant moved for summary judgment as to all of Plaintiff's claims. On January 3, 2008, the Court granted Plaintiff's Motion for Extension of Time to File a Response to Motion for Summary Judgment and gave Plaintiff until

¹ Although Plaintiff does not expressly claim "fraud in the inducement," the Court so construes her general claim of fraud.

February 4, 2008, to file a response. When Plaintiff did not file a response, court staff contacted Plaintiff's counsel by telephone. Plaintiff's counsel indicated she again intended to seek leave of Court to file a late response, but she did not do so. On February 27, 2008, the Court issued an Order giving Plaintiff notice that she had until March 3, 2008, to file a motion for leave to file a late response. The Court also advised Plaintiff that if she did not file such a motion, the Court would consider Defendant's Motion for Summary Judgment fully briefed and take it under advisement. Plaintiff did not file such a motion, and the Court took this matter under advisement on March 3, 2008.

STANDARDS

Federal Rule of Civil Procedure 56©) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show the absence of an issue of material fact. *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir. 2005). In response to a properly supported motion for summary judgment, the nonmoving party must go beyond the pleadings and show there is a genuine issue of material fact for trial. *Id.*

An issue of fact is genuine "'if the evidence is such that a

reasonable jury could return a verdict for the nonmoving party.'" *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002)(quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The court must draw all reasonable inferences in favor of the nonmoving party. *Id.* "Summary judgment cannot be granted where contrary inferences may be drawn from the evidence as to material issues." *Easter v. Am. W. Fin.*, 381 F.3d 948, 957 (9th Cir. 2004)(citing *Sherman Oaks Med. Arts Ctr., Ltd. v. Carpenters Local Union No. 1936*, 680 F.2d 594, 598 (9th Cir. 1982)).

A mere disagreement about a material issue of fact, however, does not preclude summary judgment. *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1389 (9th Cir. 1990). When the nonmoving party's claims are factually implausible, that party must "come forward with more persuasive evidence than otherwise would be necessary." *Wong v. Regents of Univ. of Cal.*, 379 F.3d 1097 (9th Cir. 2004), *as amended by* 410 F.3d 1052, 1055 (9th Cir. 2005)(citing *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1149 (9th Cir. 1998)).

The substantive law governing a claim or a defense determines whether a fact is material. *Miller v. Glenn Miller Prod., Inc.*, 454 F.3d 975, 987 (9th Cir. 2006). If the resolution of a factual dispute would not affect the outcome of the claim, the court may grant summary judgment. *Id.*

DISCUSSION

Defendant moves for summary judgment as to each of Plaintiff's eight claims. Defendant argues Plaintiff's state-law claims are time-barred because they were not filed within the ninety-day statute of limitations that began to run when BOLI issued its right-to-sue notice. Defendant also contends the issues underlying Plaintiff's claims asserted in her Complaint were addressed and agreed to by the parties in the September 23, 2005, Agreement with the exception of Plaintiff's ADEA claim. Finally, Defendant contends it is entitled to summary judgment as to Plaintiff's ADEA claim.

I. Plaintiff's state-law claims are time-barred.

Defendant contends the statute of limitations bars Plaintiff's state-law claims because Plaintiff did not file those claims within ninety days of BOLI's right-to-sue notice. See Or. Rev. Stat. §§ 659A.875(2), 659A.880(3). As noted, on April 20, 2006, BOLI issued its notice of Plaintiff's right to file a civil lawsuit based on the allegations in her complaint. Plaintiff, however, did not commence her action in this Court until November 7, 2006, which is more than ninety days from April 20, 2006. Because Plaintiff did not file her claim in the time required under Oregon law, she does not have the right to pursue her state-law claims based on the allegations in her BOLI

complaint. *Id.* Thus, Plaintiff's Claim Four for unlawful retaliation, Claim Five for wrongful discharge, and Claim Eight for intentional infliction of emotional distress are time-barred because each of these claims arises out of allegations in Plaintiff's BOLI complaint that Defendant subjected her to discriminatory and hostile treatment.

II. Separation Agreement.

With the exception of Plaintiff's ADEA claim, Defendant contends each of Plaintiff's claims is barred by the terms of the Agreement that Plaintiff and Defendant entered into when Defendant terminated Plaintiff. In his Affidavit, Anderson testifies he and Plaintiff negotiated the Agreement at arms-length and that he has fully satisfied his obligations under the Agreement.

In her Complaint, Plaintiff alleges two contract claims related to the Agreement: fraud in the inducement of the contract and breach of contract. With the exception of her fraud claim, Plaintiff does not challenge the existence of a contract between Plaintiff and Defendant but seeks to enforce the contract against Defendant. Viewing Plaintiff's Complaint in the light most favorable to her, Plaintiff alleges Defendant breached two terms of the Agreement: (1) Defendant did not provide a timely letter of reference and (2) Defendant breached his implied obligation of good faith and fair dealing because Anderson's

letter of reference was not sufficiently detailed to be useful for Plaintiff.

As noted, Defendant contends the Agreement bars each of Plaintiff's claims with the exception of her ADEA claim on the ground that the agreement provides Plaintiff "release[s] and discharge[s] any and all" claims against Defendant "relating in any way to [Plaintiff's] employment by Oregon Glass or the termination thereof." Plaintiff's claims related to the formation and performance of the Agreement itself, however, cannot be barred by this provision because it would, in effect, render the Agreement legally unenforceable. Thus, the Court considers Plaintiff's claims for fraud in the inducement and breach of contract on the merits.

A. Validity of the Separation Agreement.

1. The Agreement Generally.

As noted, Defendant contends the Agreement is valid and Plaintiff is barred under the Agreement from bringing claims against Defendant related to her employment and termination with the exception of her ADEA claim. Plaintiff, in turn, alleges in her Complaint that she was "bullied" into signing the Agreement and accepting severance pay.

The Ninth Circuit has held: "A general agreement of Title VII claims does not violate public policy. To the contrary, public policy favors voluntary settlement of employment

discrimination claims brought under Title VII." *Stroman v. West Coast Grocery Co.*, 884 F.2d 458, 460-61 (9th Cir. 1989)(internal citation and quotation omitted). The court, however, "must closely scrutinize a waiver of rights under Title VII because of their remedial nature." *Id.* at 461. A waiver of civil rights under federal law must be "voluntary, deliberate, and informed." *Id.* at 462.

The terms of the Agreement clearly and unambiguously provide Plaintiff released and discharged all claims against Defendant relating to her employment and termination. As noted, Plaintiff was a human-resources professional, well-educated in employment law, and, therefore, well-positioned to understand the provisions of the Agreement. Anderson also testified Plaintiff created the Agreement herself and had used a similar agreement related to the termination of a sales manager a few months earlier. Moreover, Plaintiff negotiated for additional consideration for the release of her claims against Defendant; *i.e.*, she secured extended health-insurance coverage and a letter of reference in addition to \$2,000 in severance pay.

In addition, Anderson testified Plaintiff contacted him the day after her termination to request that Defendant not oppose Plaintiff's claim for unemployment benefits, and Anderson agreed.

Thus, the totality of these circumstances belies Plaintiff's allegation that she was bullied into signing the Agreement.

2. Fraud in the Formation of the Agreement.

In her Seventh Claim, Plaintiff appears to allege Anderson fraudulently induced her to enter into the Agreement by making intentionally false promises that he would provide her with a reference letter within two weeks.

In *Webb v. Clark*, the Oregon Supreme Court sets out the nine elements a party must prove to prevail on a claim of fraud:

(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury.

274 Or. 387, 391 (1976).

Anderson testified the Agreement was a valid contract negotiated at arms-length, Plaintiff was an experienced human-resources professional, she drafted the Oregon Glass Agreement, and she successfully negotiated for additional consideration in exchange for her release and discharge of any claims against Defendant upon her termination.

In his Affidavit, Anderson testified he agreed to provide Plaintiff with a reference letter as part of the consideration for Plaintiff's agreement to release and to discharge all claims against Defendant. Anderson's handwritten notes on the original of the Agreement indicate he agreed to

provide Plaintiff with "a written reference letter within two weeks from [September 23, 2005]." Anderson testified he provided Plaintiff with a letter of reference on October 18, 2005, (which is attached as Exhibit Three to Anderson's Affidavit) in accordance with the Agreement. At Plaintiff's request for a more detailed letter outlining her duties, Anderson provided Plaintiff with a second reference letter on April 20, 2005.

Beyond the allegations in her Complaint, Plaintiff does not provide any evidence that Anderson falsely stated he would provide a reference letter for her or that he intended Plaintiff to rely on such a false statement when she entered into the Agreement.

On this record, the Court concludes no factual basis exists on which a reasonable juror could find Defendant fraudulently induced Plaintiff to enter into the Agreement and to release and to discharge all claims against Defendant related to her employment and termination. Moreover, the Court concludes Plaintiff made a voluntary, deliberate, and informed waiver of her rights in the Agreement that she entered into with Defendant. Although the Court concluded Plaintiff's state-law claims for wrongful discharge, retaliation, and intentional infliction of emotional distress are time-barred, the Agreement also precludes Plaintiff from bringing those claims in this Court.

B. Breach of the Agreement.

In Claim Six, Plaintiff alleges Defendant breached the Agreement because it did not provide her with a timely and sufficient letter of reference.

A claim for breach of contract accrues when a party to the agreement does not perform a duty owed to another party. *Kantor v. Boise Cascade Corp.*, 75 Or. App. 698, 703 (1985). Proof of damage caused by the defendant's nonperformance is an essential element of a breach-of-contract claim. *Moini v. Hewes*, 93 Or. App. 598, 602 (1988).

Contracts include an implied obligation of good faith and fair dealing "to facilitate performance and enforcement of the contract when it is consistent with and in furtherance of the agreed-upon terms of the contract, or where it effectuates the parties' objectively reasonable expectations under the contract." *Morrow v. Red Shield Ins. Co.*, 212 Or. App. 653, 661-62 (2007).

1. Timeliness of Reference Letter.

In her Complaint, Plaintiff contends Defendant breached the Agreement by failing to provide the agreed-to reference letter within two weeks of her termination and that she suffered damages as a result, which included her inability to find full-time work in human resources.

In the Agreement, Defendant was required to provide a letter of reference to Plaintiff within two weeks of the date of

the Agreement. Defendant provided Plaintiff the reference letter on October 18, 2005, which was over three weeks after execution of the Agreement. In its Motion for Summary Judgment, Defendant does not dispute these facts and does not offer any argument to defend its delay or to dispute Plaintiff's allegation that she was damaged by Defendant's breach.

Thus, on this record, the Court concludes a genuine issue of material fact exists as to whether and to what extent Plaintiff was damaged by this alleged breach of the Agreement by Defendant.

2. Sufficiency of Reference Letter.

Plaintiff also alleges even though Defendant provided reference letters, Defendant breached the implied covenant of good faith and fair dealing because the letters were of little or no value to Plaintiff. Plaintiff contends Defendant's initial reference letter was not sufficient because it only contained her dates of employment, her job duties, and incorrectly identified Plaintiff's job title. Several months later, Plaintiff requested Anderson to revise the reference letter. As noted, Anderson provided Plaintiff with a second reference letter on April 20, 2006, which Anderson testified included a "number" of the changes suggested by Plaintiff. Nevertheless, Plaintiff contends Anderson's letters did not satisfy her "reasonable expectations" under the Agreement.

Although Defendant did not directly address the breach-

of-contract claim in its Memorandum in Support of its Motion for Summary Judgment, Anderson testified in his Affidavit that he provided Plaintiff with useful reference letters and that he satisfied all of Defendant's obligations under the Agreement.

The Agreement required Defendant to provide a "written letter of reference" and did not elaborate on the contents. Anderson's initial reference letter included Plaintiff's dates of employment and her job duties in Defendant's human resources department. The reference letter indicates Plaintiff's position was "HR Generalist" even though Plaintiff was the HR Director. The initial letter noted Plaintiff "dealt with day-to-day employee issues and managed employee harassment and workers compensation insurance claims. As her supervisor and the General Manager of Oregon Glass I was informed of the issues that affected our employees, or could have negative effects upon our company." In addition, Anderson indicated prospective employers could contact him directly if further references were needed.

In the second reference letter, Anderson corrected Plaintiff's job title and provided a few more details regarding Plaintiff's responsibilities such as her supervisory duties and her role in developing a safety committee and web-based timekeeping.

On this record, the Court concludes genuine issues of material fact exist as to Plaintiff's Claim Six for breach of

contract arising from the sufficiency of the reference letters, including what the "objectively reasonable expectations" of the parties were under the Agreement for the letter of reference and whether the reference letters provided by Anderson were sufficient to satisfy the provision of the Agreement. See *Morrow*, 212 Or. App. at 662.

III. ADEA Claim.

Plaintiff's Second Claim alleges Defendant terminated Plaintiff because of her age and replaced her with a younger employee in violation of the ADEA. Defendant moves for summary judgment on the ground that Plaintiff has not shown Defendant's decision to terminate Plaintiff was motivated by Plaintiff's age.

ADEA makes it "unlawful for an employer . . . to discharge any individual [who is at least forty years of age] . . . because of such individual's age." 29 U.S.C. §§ 623(a), 631(a). There are two theories of recovery under ADEA: disparate treatment and disparate impact. *Rose v. Wells Fargo Co.*, 902 F.2d 1417, 1421 (9th Cir. 1990). A disparate-impact claim "challenges employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Id.* at 1423 (citations and internal quotations omitted). On the other hand, a disparate-treatment claim under ADEA focuses on the employer's motive underlying the employment decision. *Id.* at

1421. The plaintiff must show the employer treated the plaintiff differently than others similarly situated because of age. *Id.*

The burden of production on summary judgment shifts during an ADEA case as follows:

[A] plaintiff must first establish a *prima facie* case of discrimination. If the plaintiff establishes a *prima facie* case, the burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for its employment decision. Then, in order to prevail, the plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision is a pretext for another motive which is discriminatory.

Lowe v. City of Monrovia, 775 F.2d 998, 1009 (9th Cir. 1985), amended by 784 F.2d 1407 (1986).

An ADEA claim may only be waived by agreement if the waiver is "knowing and voluntary," and any Agreement must specifically refer to the employee's rights under the ADEA to be valid. 29 U.S.C. § 626(f)(1). See *Syverson v. Int'l Bus. Mach.*, 472 F.3d 1072, 1074 (9th Cir. 2007).

A. Plaintiff's *Prima Facie* Case.

A plaintiff may establish a *prima facie* case of disparate treatment by offering direct evidence of the employer's discriminatory intent. *Wallis v. J.R. Simplot*, 26 F.3d 885, 889 (9th Cir. 1994). Absent direct evidence, a plaintiff may also establish a *prima facie* case through a presumption of discrimination that arises out of proof of four factors: the

plaintiff was a member of a protected class (*i.e.*, age forty to seventy), the plaintiff was performing her job in a satisfactory manner, the plaintiff was discharged, and the plaintiff was replaced by a substantially younger employee with equal or inferior qualifications. *Rose*, 902 F.2d at 1421.

Beyond the allegations in her Complaint, Plaintiff does not offer any direct evidence of Defendant's discriminatory intent. When taken in the light most favorable to Plaintiff, however, Plaintiff's alleged facts are sufficient to establish a *prima facie* case of age discrimination: Plaintiff was over forty and under seventy at all relevant times; Plaintiff was performing her duties as HR Director satisfactorily; Plaintiff was terminated; and Defendant replaced Plaintiff with candidate who was "clearly under forty" and who was being interviewed to be Plaintiff's subordinate. *See id.* Because Plaintiff established a *prima facie* case, the burden shifts to Defendant to provide a legitimate, nondiscriminatory reason for terminating Plaintiff. *See Lowe*, 775 F.2d at 1009.

B. Defendant's Motion for Summary Judgment.

As noted, Defendant concedes the Agreement does not contain sufficiently specific language to constitute a knowing and voluntary waiver of Plaintiff's ADEA claim. In its Motion for Summary Judgment, however, Defendant contends Plaintiff's age-discrimination claim fails on the merits. In Anderson's

Affidavit, he testified he terminated Plaintiff's employment "for unsatisfactory job performance. . . . [including] her failure to hire employees as necessary and her inappropriate handling of the recruitment and hire of a Human Resources assistant. Ms. Duffy's age had nothing to do with the decision." Defendant, therefore, articulated a legitimate, nondiscriminatory reason for terminating Plaintiff based on her work performance.

To defeat Defendant's Motion for Summary Judgment, Plaintiff must counter Defendant's reason for terminating her employment by "specific" and "substantial" proof that Defendant's proffered reason was a pretext for unlawful discrimination. *Wallis*, 26 F.3d at 890 ("A plaintiff cannot defeat summary judgment simply by making a *prima facie* case."). As noted, Plaintiff did not file a response to Defendant's Motion, and, therefore, Plaintiff has not met her burden to provide evidence beyond the allegations in her Complaint that establish Defendant had a discriminatory motive.

The Court, therefore, grants Defendant's Motion for Summary Judgment as to Plaintiff's Claim Two.

CONCLUSION

For these reasons, the Court **DENIES** Defendant's Motion for Summary Judgment (#21) as to Plaintiff's Claim Six for breach of contract and **GRANTS** Defendant's Motion as to each of Plaintiff's

remaining claims.

IT IS SO ORDERED.

DATED this _29th_ day of April, 2008.

___/s/ Anna J. Brown___
ANNA J. BROWN
United States District Judge